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90-1563

Supreme Court, U.S.
FILED
APR 8 1991
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Case Number:

UNITED STATES SUPREME COURT
OCTOBER 1990 TERM

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

PATRICK McEVOY,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Counsel:
Charles C. Luetke
Deutsch & Spring
Attorneys for
Petitioner
Office & P.O.
Address
300 Madison Avenue
New York, N.Y. 10017

QUESTIONS PRESENTED

1. Whether or not due process of law is violated by the commencement of a criminal action pursuant to a statute that requires actual prior notice, where the accused has not had actual prior notice.
2. Whether or not requiring a landlord to spend amounts far in excess of potential rental income to restore a tenant constitutes the taking of property without due process of law where the applicable statute requires a landlord to take only reasonable steps to restore such tenant.
3. Whether or not a criminal defendant is deprived of his 6th Amendment Right to effective counsel by refusing to grant a reasonable adjournment based on the actual engagement of his counsel on another matter and forcing such defendant to be tried with counsel with little familiarity with the matter.

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TABLE OF AUTHORITIES

Atco Midwood Associates v. Benitez 106 AD 2nd 501, 482 NYS 2d 839

Oberlander v. Perales 740 F2d 116 (2nd Cir. 1984)

US v. King 762 F2d 252 2nd Cir.

References to Reports of Opinions delivered in this case by other Courts

Trial - Criminal Court of the City of New York County of New York. No official report of this Court's opinion in this matter exists. A copy of the opinion appears in the appendix to this Petition.

Appeal - New York Supreme Court - Appellate Term - First Department. No official report of this Court's opinion in this matter exists. A copy of the unofficial report of the opinion which appeared in The New York Law Journal on July 20, 1990 appears in the appendix to this Petition.

New York State Court of Appeals - No official report of this Court's opinion in this matter exists. A copy of the "Certificate Denying Leave to Appeal" appears in the appendix to this Petition.

United States District Court for the Southern District of New York - No official report of this

Court's opinion in this matter exists. A copy of the decision to vacate the Petitioner's Petition for a Writ of Habeus Corpus appears in the appendix to this Petition.

New York State Court of Appeals - No official report of this Court's opinion in this matter exists. A copy of the "Certificate Granting Reconsideration and Adhering to Prior Determination" appears in the appendix to this Petition.

Statement of Grounds on which the Jurisdiction of this Court is invoked.

(i) The date of entry of the judgment sought to be reviewed is January 7, 1991.

(ii) This Court has jurisdiction to review the judgment in question pursuant to Rule 13.1 of the Rules of the Supreme Court as the judgment was rendered by the highest Court of the State of New York in a criminal matter within the last 90 days.

Applicable Constitutional Provisions and Statutes.

The Constitutional Provisions relied upon are:

Fourteenth Amendment to the United States Constitution which states,

"All the persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Sixth Amendment to the United States Constitution which states,

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been commited, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsatory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

New York City Administrative Code Sec. 26-521, which is set forth in its entirety in the appendix.

Concise Statement of the Case Containing the Facts Material to the Consideration of the Questions Presented.

1. The Statuteunder which the Petitioner was convicted, [NYC Administrative Code Section 26-521(b)], makes it criminal to take steps to keep a tenant who has been removed from an apartment out of his/her apartment once a demand to be restored has been made. The criminal proceeding against Mr. McEvoy was commenced on the same day as a letter demanding that the tenancy be restored was mailed. Hence, Mr. McEvoy did not have prior notice as required by the statute.

2. Testimony was heard at trial that approximately $200,000.00 would have had to be invested to renovate the building. At the then prevailing interest rates, a twenty (20) year loan of $200,000.00 would require a monthly repayment obligation of approximately $24,770. per year. Testimony was also introduced that the expected rental income was approximately $30,000.00. Since only slightly more than $5,000.00 would be available for any other maintenance, renovations and improvements, this

is obviously not an economically feasible exercise.

3. The Petitioner's counsel of choice, Laurence E. Deutsch was actively engaged in another trial on the day the Petitioner's trial began. The Petitioner was forced to begin his trial with an attorney that received the file the evening before the trial was to begin. The trial judge refused to grant even a one day adjournment. Representation by counsel who is not fully prepared for a trial must by its very nature compromise the quality of that representation.

The basic points raised in the last section were raised by the Petitioner to the Appellate Term of the New York State Supreme Court directly or by implication in Petitioners briefs. These issues were raised exactly as described in (g) in the petitioners application for leave to appeal to the New York State Court of Appeals. (A copy of the Petitioner's Memorandum of Law in support of application for leave dated December 17, 1990 appears in the

appendix to this Petition). The federal questions were ignored or were not specifically addressed by each Court that the Petitioner has applied to.

Reasons this Matter Should Be Reviewed By The Court

POINT I

CONVICTION OF THE PETITIONER UNDER SECTION 26-521(b) of the New York City Administrative Code, denied Petitioner due process of law, since the evidence plainly established that the Notice required to be given as a condition of finding a violation was given subsequent to the issuance of the information upon which the violation was based

26-521(b) of the New York City Administrative Code provides in pertinent part:

> "b. it shall be unlawful for an owner of a dwelling unit to fail to take all reasonable and necessary action to restore to occupancy an occupant of a dwelling unit who either vacates, has been removed from, or is otherwise prevented from occupying a dwelling unit as the result of any of the acts or omissions prescribed in subdivision a of this section and to provide to such occupant a dwelling unit within such dwelling suitable for occupancy, after being requested to do so by such occupant or the representative of such occupant, if such owner either committed such unlawful acts or omissions or knew or had reason to know of such unlawful acts or omissions, or if such acts or omissions occurred within seven days prior to such request." (Emphasis added)

In the instant case, the testimony of the occupant of the subject unit was that she mailed a letter to petitioner requesting to have access to her apartment at a point subsequent to May 8,

1987. However, the accusatory instrument was dated May 8, 1987. These facts are confirmed by the trial testimony.

> "THE COURT: That's fine. However, the accusatory instrument is dated May 8th. This case is being tried based upon allegation of fact which took place prior to that time. That deed does not show the operative date as May 8th. I don't know what bearing that deed would have on this." (Emphasis added)
>
> (DeG., pp. 56-58)

"Q. Now, I believe that you said that you never had any communication with Mr. McEvoy?

A. He never made any effort.

Q. No, no, did you have any communication with him?

A. No.

Q. I show you this document and I ask you whether or not you can identify it.

A. It's mine.

Q. Was that sent to Mr. McEvoy?

A. Yes.

Q. When was it sent to Mr. McEvoy?

> MS. NELSON: Can we have that identified for the record?
>
> THE COURT: That's People's 6, the letter. Is that it?
>
> MR. DEUTSCH: I don't know, I have a copy. I wasn't here this morning.

MS, NELSON: Yes, this is People's 6.

THE COURT: It's already in evidence.

MR. DEUTSCH: Then may I have the copy back in evidence?

A. I don't know when it was delivered, but it has May 8th, 1987 on it.

Q. Well, after you signed it, what did you do with it?

A. I sent it.

Q. To whom?

A. McChips Associates, addressed to Mr. McEvoy.

Q. Did you send it on May 8th?

A. No, I sent it later.

Q. You sent it after May 8th?

A. Yes.

Q. And you sent it by mail, hand delivered or how?

A. By mail, registered.

Q. And other than this communication, did you ever have any other communication with anyone on behalf of McChip Associates?

A. No."

(Emphasis added)

The instrument utilized as the basis of

this prosecution was invalid as to the violation of 26-521(b) since this statute presumes that a landlord has been notified of the tenant's desire to be restored to occupancy (and therefore an opportunity to comply with the request is afforded). The Notice posted subsequent to the execution of the accusatory instrument is wholly insufficient to satisfy the obvious intention of the Notice requirement. Consequently, prosecution of Petitioner under 26-521(b) was violative of Petitioner's fundamental constitutional right to due process of law.

> "No State shall ... deprive any person of liberty ... without due process of law..."

It is long understood that two of the cornerstones of due process are notice and an opportunity to be heard. See e.g. Oberlander v Perales, 740 F2d 116, 120 (2 Dept. 1984). If this concept is logically extended one step further, it would certainly appear that due process is offended when a statute which requires notice as a condition of violation is deemed to have been violated when notice was not

afforded at the time the violation was alleged. Due process is similarly flaunted where, as here, a defendant is prosecuted where the underlying facts obviously depart from the normal import of the language of the statute.

POINT II

CONVICTION OF THE PETITIONER UNDER SECTION 26 521(b) of the New York City Administrative Code for failing to take reasonable action to restore the tenant, denied petitioner due process of law, since the evidence established that the repairs required were wholly unfeasible from an economic standpoint. Thus, requiring Petitioner to make such repairs, deprived Petitioner of the reasonable use of his property without due process.

Once again our attention is turned to Section 26-52 (b) which provides, in relevant part:

> "It shall be unlawful for an owner of a dwelling unit to fail to take all reasonable and necessary action to restore to occupancy an occupant of a dwelling unit."
>
> (emphasis added)

'Reasonable' must be defined by its everyday common utilization, which is "not extreme or excessive" -- Webster's 7th New Collegiate Dictionary 1967.

It is respectfully contended that requiring a landlord to make repairs to enable a tenant to be restored to possession is not reasonable where the cost of such repairs far exceeds the potential rental income to be derived.

The following excerpt of the trial transcript gives a precise picture of the economic circumstances involved, (Tr. pg. 156 in 14 to Tr. pg 157 line 16:

Q. Mr. McEvoy, you previously testified that you made a determination of the cost to place the building in a habitable condition.

A. Yes.

Q. Have you ever made an analysis of whether or not the building after such renovations could sustain itself?

A. Yes.

Q. Economically?

A. Yes.

MS. NELSON: Objection to the relevance.

THE COURT: Overruled.

Q. Now, what factors did you take into consideration in making that determination?

A. Well --

THE COURT: Off the record.

(Discussion held off the record.)

A. What was the question again?

(Last question read back by court reporter)

A. Well, you spend forty thousand a unit to renovate it and there are three units in the building and one store and the store being in the middle of a block it's not a very -- not a good place to rent a store and to rent the apartments would probably bring about six, six-fifty a month after renovation and you're talking about getting back something like twenty-five hundred dollars on the building, it's not a good investment.

The Appellate Term, 1st Department, was presented with the above situation together with the added fact that obtaining a $200,000.00 loan for a period of twenty (20) years at prevailing rates of interest would require repayment of approximately Twenty-Four Thousand, Seven-Hundred and Seventy Dollars. ($24,770.00) This, when viewed with a potential annual income of $30,000 from rent leaves only slightly more than $5,000 per annum for improvements not related to the initial modifications to make the structure fit for habitation. This is obviously not an economically feasible exercise.

The Due Process Clause of the 14th Amendment of the United States Constitution provides,

in its relevant part,

> "No state shall ... deprive any person of life, liberty, or property without due process of law."
>
> (Emphasis added)

It would appear that a denial of the right to utilize one's property in an economically feasible manner is tantamount to a deprivation of the property itself. Decisions in this state have already acknowledged that economic feasibility is one question which courts may consider in determining whether to require repairs to a multiple dwelling structure. See eg. Atco Midwood Associates v. Benitez 106 AD 2nd 501, 482 NYS 2d 839 (AD 2 Dept 1984). It follows that the failure of the trial court to give consideration to the economic evidence and the finding of culpability derived petitioner of reasonable use of his property without due process of law.

POINT III

THE FAILURE OF THE TRIAL JUDGE TO GRANT PETITIONER A BRIEF ADJOURNMENT DUE TO THE FACT THAT HIS CHOSEN COUNSEL WAS OTHERWISE ENGAGED, DEPRIVED PETITIONER OF EFFECTIVE ASSISTANCE OF COUNSEL

The right to the effective assistance of counsel is provided by the Sixth Amendment to

the United States Constitution and is applied to the State Action by the 14th Amendment. It provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense."

In the instant case, petitioner's trial commenced on December 8, 1987 before Judge Leland DeGrasse. At that time Michael Silverstein, an associate of the trial counsel, Laurence E. Deutsch, was present. Mr. Silverstein pointed out to the court that Mr. Deutsch was in the process of selecting a jury in a matter before Judge Cohen in Kings County and requested a brief adjournment. This request was denied, notwithstanding the fact that Mr. Silverstein advised the court that he had been given the file the day before (Monday, December 7, 1987) and that "Mr. McEvoy does not want me to represent him" (Trial Transcript pg. 2 lines 14-15). Later on, petitioner was afforded the Hobson's choice of having an attorney with only fleeting familiarity with the case represent him or representing himself. The trial proceeded. Mr. Deutsch managed to interupt his jury selection

to attend the afternoon session where the situation was again explained to the judge. The following is an excerpt of the trial minutes which illustrates the situation:

> MR. DEUTSCH: The information you have been given is accurate to the extent that I had advised the justice presiding in the trial part, in criminal court, New York County, on the last calendar call of this case that I would be engaged in family court, Westchester County on the morning of the 7th and requested that this case be adjourned to at least twelve noon. At that time I was not aware of the fact that I would be directed by Judge Cohen to proceed with the other case. I cannot control the calendars of either court. I have no way of telling Judge Cohen that once we start his action that I must come to criminal court, New York County. Now this is not something of my making. It is not a request of an adjournment because I wanted an adjournment or because it is convenient for me or for any other reason having to do with me. I am caught between two trials I am the only attorney in my firm who has enough knowledge of both the matters to try both the matters, and I am caught between essentially two judges who say I have to try a case at the same time. I have a hard time doing it with a complete body and split in half I would be unable to do it at all.
>
> THE COURT: You say you did not have enough time to interview witnesses and prepare for trial. I'm looking at the court file and it shows that the matter was adjourned from August 24th to October 29th for trial, October 29th to November 19th for trial, from November 19th to December 1st to yesterday for trial. It has been on for

quite some time for trial and you have had ample time to prepare therefore this matter will not be adjourned. (Tr. pg 48, line 12--pg49 line 20)

This circuit has held that in order to demonstrate that a trial judge abused his discretion in denying a motion for an adjournment of the scheduled start of trial, a defendant is required to establish that the denial was arbitraryand substantially impaired his defense... U.S. v. King 762 F2d 252 (2 Cir 1985) cert den. 106 S.CT 1203, (1986). It is respectfully submitted that the facts presented herein demonstrate that the denial of the requested adjournment was arbitrary and that the facts that Mr. Deutsch had been called away from a jury selection and that the trial continued on consecutive days (December 9 and December 10) afforded Mr. Deutsch and petitioner no time for preparation, significnatly compromised the quality of the petitioner's defense. The scenario results in a conclusion that petitioner was denied the constitutionally mandated effective assistance of counsel.

CONCLUSION

FOR ALL THE REASONS SET FORTH HEREIN, IT IS RESPECTFULLY REQUESTED THAT THIS COURT GRANT THIS PETITION FOR A WRIT OF CERTIORARI

Dated: New York, New York
April 5, 1991

Respectfully submitted,

Charles C. Luetke
Deutsch & Spring

Attorneys for Petitioner
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New York, NY 10017
(212) 661-0722

APPENDIX

Decision of the Criminal Court of the City of New York.

Decision of the New York State Supreme Court Appellate Division.

Decision of the New York State Court of Appeals (September 4, 1990).

Decision of the United States Court for the Southern District of New York.

Decision of the New York State Court of Appeals (January 7, 1991).

Memorandum of Law in Support of Application for Leave to Appeal to the New York State Court of Appeals.

New York City Administrative Code sec. 26-521

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

----------x

PEOPLE OF THE STATE OF NEW YORK,

-against-

Docket No.: 7N047191

PATRICK McEVOY,

Defendant.

----------x

DEGRASSE, LELAND J.:

After trial, defendant is found guilty of causing an unlawful eviction in violation of Administrative Code of the City of New York S. 26-521 (formerly S. D16-1.01).

Defendant is a principal of McChip Associates, the owner of premises located at 215 East 3rd Street in Manhattan. The premises consist of two apartment buildings separated by a courtyard (hereinafter referred to as the front building and the rear building). A passageway through the front building provides the only access to the courtyard and the rear building.

The complainant, Maria Miliczenko and her family have lived in a rear building apartment for at least 33 years. On December 20, 1985,

the front building's facade partially collapsed causing the evacuation of the building pursuant to a vacate order of the New York City Department of Buildings. The vacate order cited the imminent danger of further collapse. As another consequence of the collapse, the Milicz enkos and the other tenants have been unable to enter the rear building. Both buildings remain vacant to this day.

Administrative Code S. 26-521, in pertinent part, provides:

> Unlawful eviction. a. It shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer* * * except to the extent permitted by law pursuant to a warrant of eviction or other order of a court of competent jurisdiction or a governmental vacate order by:
>
> (1) using or threatening the use of force to induce the occupant to vacate the dwelling unit; or
>
> (2) engaging in a course of conduct which interferes with or is intended to interfere with or disturb the comfort, repose, peace or quiet of such occupant in the use or occupancy of the dwelling unit, to induce the occupant to vacate the dwelling unit including, but not limited to, the interruption or discontinuance of essential services; or

(3) engaging or threatening to engage in any other conduct which prevents or is intended to prevent such occupant from the lawful occupancy of such occupant from the lawful occupancy of such dwelling unit or to induce the occupant to vacate the dwelling unit* * *

b. It shall be unlawful for an owner of a dwelling unit to fail to take all reasonable and necessary action to restore to occupancy an occupant of a dwelling unit who either vacates, has been removed from or is otherwise prevented from occupying a dwelling unit as the result of any of the acts or omissions prescribed in subdivision a of this section and to provide to such occupant a dwelling unit within such dwelling suitable for occupancy, after being requested to do so by such occupant or the representative of such occupant, if such owner either committed such unlawful acts or omissions or knew or had reason to know of such unlawful acts or omissions, or if such acts or omissions occurred within seven days prior to such request.

The people were permitted to adduce evidence of the following other related prosecutions pursuant to People v. Molineaux (168 NY 264).

On July 18, 1985, defendant was issued two summonses for building violations. The summonses led to separate prosecutions for failure to maintain the subject premises in a safe condition, in violation of Administrative Code S. 27-127 (formerly Section C26-105.1).

The two informations filed contain allegations of hazardously bulged and defective brickwork on the facade. Erin Construction Corp., of which defendant is also a principal, pled guilty to both informations as a substituted defendant. Evidence of these prosecutions is probative of defendant's knowledge of the facade's dangerous condition as well as the specific intent required by the statute (Administrative Code 26-521 (a) [1] and [2]). In this connection, it is also significant that 13 weeks before the collapse, defendant told Ms. Miliczenko that her family would have to move because the building was unsafe.

On April 28, 1986, defendant was issued three more summonses for his failure to repair the facade. These summonses also resulted in prosecutions and convictions for failure to maintain the premises in a safe condition. Defendant did not repair the collapsed facade until October, 1986.

Prior to the facade's collapse, defendant

neglected other essential repairs to the premises. In July, 1984, defendant's delay of certain plumbing repairs caused the tenants to be deprived of running water for two weeks.

It is settled that a constructive eviction occurs where a landlord fails to repair premises causing them to become unfit or unsafe for occupancy (Tallman v. Murphy, 120 NY 345).

Defendant is criminally liable for the acts or omissions of his corporation (Penal Law Section 20.25). It has been proven beyond a reasonable doubt, that defendant engaged in a course of conduct calculated to drive the Miliczenkos and other tenants from their apartments. He had more than sufficient notice of the facade's hazardous condition but did nothing to avert its collapse with the resultant consequences.

The vacate order does not relieve defendant of liability under either subdivision of the statute. Defendant could have, but failed to, repair the facade within a reasonable time.

Such repairs would have led to a rescission of the vacate order. However, no steps were taken to repair the facade until 10 months after the tenants were forced to vacate the premises.

Accordingly, defendant's guilt has been established under subdivisions a (2)(3) and b of the statute.

March , 1988

LD

J.C.C.

APPELLATE TERM

By Ostrau, P.J.; Sandifer and Miller, JJ.

88-490. PEOPLE, res, v. PATRICK McEVOY, ap—Judgment of conviction rendered May 5, 1988 (DeGrasse, J.) affirmed.

We conclude that the weight of the evidence adduced at trial establishes that the defendant engaged in a course of conduct calculated to induce the complaining witness, a rent controlled tenant for more than 30 years, to vacate the subject dwelling unit. Defendant's actions in failing to correct violations of record or otherwise maintaining the premises—which resulted in the collapse of the building wall—and his further inaction in unreasonably delaying the repairs necessary to rescind the vacate order and restore the premises to habitable condition, were clearly violative of section 26-521 of the Administrative Code. Defendant's studied indifference to his owner obligations and pattern of neglect (which included the posting of his own vacate notice) surely rendered the building unsafe and unfit for habitation and prevented tenant from lawfully occupying her dwelling unit. The fact that the Department of Buildings was ultimately required to issue a vacate order in this case did not, as found below, absolute defendant from culpability under the Code. Nor were defendant's allegations of economic unfeasibility—even assuming they would constitute a defense in this criminal proceeding—established below (see Eyedent v. Vickers Mgt., 120 AD2d 202).

We have examined defendant's remaining contentions and find them to be without substantial merit. The trial court did not abuse its discretion in refusing to grant defendant a further adjournment (People v. Singleton, 41 N.Y. 2d 402, 405). The sentence imposed was not excessive.

Sandifer, J. and Miller, J. concur; Ostrau, P.J., concurs in part and dissents in part in the following memorandum:

Ostrau, P.J.—Although, I agree that the evidence is sufficient to sustain the defendant's conviction under Administrative Code 26-521 the imposition of a jail sentence is unduly harsh. The $1,000 fine imposed was an appropriate penalty.

State of New York

Court of Appeals

CERTIFICATE
DENYING
LEAVE

BEFORE: HON. JOSEPH W. BELLACOSA, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

against

Patrick McEvoy,

Appellant.

I, JOSEPH W. BELLACOSA, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Stay denied as academic.

Dated at Albany, New York

September 4, 19 90

Joseph W. Bellacosa

Associate Judge

*Description of Order:
Order of the Appellate Term, First Department, dated July 19, 1990, affirming a judgment of the Criminal Court of the City of New York, rendered May 5, 1988.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRICK McEVOY, Petitioner, - against - ALLYN SIELAFF, COMMISSIONER OF CORRECTIONS, CITY OF NEW YORK, Respondent.	:	MEMORANDUM ORDER 90 Civ. 6131 (PKL)

LEISURE, District Judge:

This petition for a writ of habeas corpus was referred to United States Magistrate Kathleen A. Roberts on October 9, 1990. On October 30, 1990, Magistrate Roberts issued a Report and Recommendation recommending that the petition be dismissed on the ground that petitioner has failed to exhaust his state remedies. On November 2, 1990, petitioner was released from custody.

"A basic tenet of federal jurisdiction is that when a court is presented with issues that 'are no longer "live"' or when the parties 'lack a cognizable interest in the outcome,' the case is moot and therefore outside the

court's jurisdictional authority." In re Tax Refund Litigation, 1990 U.S. App. LEXIS 16016 at 3 (2d Cir. September 11, 1990) (quoting R.C. Bigelow Inc. v. Unilever N.V., 867 F.2d 102, 105 (2d Cir. 1989) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969))). In the instant action, the release of petitioner from custody has rendered moot his petition for a writ of habeas corpus pursuant to 28 U.S.C. S. 2254. See United States v. Bradford, 194 F.2d 197 (2d Cir.) (L. Hand, J.), cert. denied, 343 U.S. 979 (1952) and 347 U.S. 945 (1954); Paul v. Sava, 85 Civ. 5796 (CSH) slip op. (September 17, 1985) (petitioner's release from custody rendered his petition for a writ of habeas corpus moot). Therefore, this Court need not consider whether to accept or reject Magistrate Robert's recommendation that petitioner's petition for a writ of habeas corpus be denied.

SO ORDERED

New York, New York
November 20, 1990

Peter K. Leisure
U.S.D.J.

Copies of this Order have been mailed to:

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Magistrate Roberts

State of New York
Court of Appeals

CERTIFICATE GRANTING RECONSIDERATION AND ADHERING TO PRIOR DETERMINATION

BEFORE: HON. JOSEPH W. BELLACOSA, Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

Patrick McEvoy,

Appellant.

Appellant having requested reconsideration of my order dated September 4, 1990 denying said appellant's application for permission to appeal pursuant to Criminal Procedure Law §460.20; and said application for reconsideration having hereby been granted;

I, Joseph W. Bellacosa, Judge of the Court of Appeals of the State of New York, do hereby adhere to my prior determination and certify that there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.*

Dated at Albany, New York
January 7, 1991

Joseph W. Bellacosa

Judge of the Court of Appeals

*Description of Order: Order of the Appellate Term, First Department, dated July 19, 1990, affirming a judgment of the Criminal Court of the City of New York, rendered May 5, 1988.

NEW YORK STATE COURT OF APPEALS

----------X

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

PATRICK McEVOY,

Petitioner.

----------X

MEMORANDUM OF LAW IN SUPPORT FOR LEAVE FOR APPEAL TO THE NEW YORK STATE COURT OF APPEALS

DEUTSCH & SPRING

Attorneys for Petitioner
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300 Madison Avenue
New York, New York 10017

STATEMENT OF FACTS

On or about May 8, 1987, petitioner was accused in a criminal information of violations of the following provisions of the New York City Administrative Code 26-521 (a)(1), 26-521 (a)(2), 26-521 (a) 26-521 (b).

Essentially, petitioner was accused of engaging in a course of conduct with the object of evicting a rent controlled tenant and eventually of preventing this tenant from returning to occupancy after the tenant vacated pursuant to an order of the Department of Buildings. A non-jury trial was conducted before Hon. Leland DeGrasse, then Criminal Court Justice, who found petitioner guilty of violating all the above-enumerated provisions with the exception of 26-521 (a)(1) (withdrawn by the People during the course of trial). On May 5, 1988, petitioner was sentenced to ninety (90) days incarceration and was fined $1,000.00. An appeal was taken to the Supreme Court of the State of New York, Appellate Term, 1st Department, with said appeal orally argued on May 8, 1989. Thereafter on or about July 24th, 1990, the three

(3) judge panel affirmed the conviction and the sentence. An application was made by the law firm of Winston & Winston to Judge Bellacosa of the New York State Court of Appeals for leave to appeal to the full court. This application was denied.on September 4, 1990. Petitioner had, up until the immediate above-mentioned date, been free due to a series of stays of execution of the sentence. However, the application to the Court of Appeals similarly denied a further stay, and Petitioner surrendered to the Court on September 5, 1990. The Court, at that time ordered him remanded to custody.

On September 24, 1990, a Petition for a writ of habeus corpus was submitted by the law firm of Deutsch & Spring to the United States District Court for the Southern District of New York. The petition sought an order vacating Patrick McEvoy's conviction as we believe that conviction violated Patrick McEvoy's constitutional rights. The petition also sought Mr. McEvoy's release from custody.*

In a report to Judge Peter K. Leisure,

United States Magistrate Kathleen Roberts recommended that the petition's merits not be considered. The rationale for this recommendation was that the New York State Court of Appeals was not given the opportunity to consider all of the constitutional issues raised in the petition to the Federal Court.

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* Judge Leisure recently issued a decision declaring the petition as moot as the petitioner has been released from custody. Patrick McEvoy still seeks the reversal of the underlying conviction so that his name will be cleared of this wrongful criminal conviction (albeit a misdemeanor.)

POINT I

CONVICTION OF THE PETITIONER UNDER SECTION 26-521(b) of the New York City Administrative Code, denied Petitioner due process of law, since the evidence plainly established that the Notice required to be given as a condition of finding a violation was given subsequent to the issuance of the information upon which the violation was based

26-521(b) of the New York City Administrative Code provides in pertinent part:

> "b. it shall be unlawful for an owner of a dwelling unit to fail to take all reasonable and necessary action to restore to occupancy an occupant of a dwelling unit who either vacates, has been removed from, or is otherwise prevented from occupying a dwelling unit as the result of any of the acts or omissions prescribed in subdivision a of this section and to provide to such occupant a dwelling unit within such dwelling suitable for occupancy, after being requested to do so by such occupant or the representative of such occupant, if such owner either committed such unlawful acts or omissions or knew or had reason to know of such unlawful acts or omissions, or if such acts or omissions occurred within seven days prior to such request." (Emphasis added)

In the instant case, the testimony of the occupant of the subject unit was that she mailed a letter to petitioner requesting to have access to her apartment at a point subsequent to May 8,

1987. However, the accusatory instrument was dated May 8, 1987. These facts are confirmed by the trial testimony.

> "THE COURT: That's fine. However, the accusatory instrument is dated May 8th. This case is being tried based upon allegation of fact which took place prior to that time. That deed does not show the operative date as May 8th. I don't know what bearing that deed would have on this." (Emphasis added)
>
> (DeG., pp. 56-58)

"Q. Now, I believe that you said that you never had any communication with Mr. McEvoy?

A. He never made any effort.

Q. No, no, did you have any communication with him?

A. No.

Q. I show you this document and I ask you whether or not you can identify it.

A. It's mine.

Q. Was that sent to Mr. McEvoy?

A. Yes.

Q. When was it sent to Mr. McEvoy?

> MS. NELSON: Can we have that identified for the record?
>
> THE COURT: That's People's 6, the letter. Is that it?
>
> MR. DEUTSCH: I don't know, I have a copy. I wasn't here this morning.

MS, NELSON: Yes, this is People's 6.

THE COURT: It's already in evidence.

MR. DEUTSCH: Then may I have the copy back in evidence?

A. I don't know when it was delivered, but it has May 8th, 1987 on it.

Q. Well, after you signed it, what did you do with it?

A. I sent it.

Q. To whom?

A. McChips Associates, addressed to Mr. McEvoy.

Q. Did you send it on May 8th?

A. No, I sent it later.

Q. You sent it after May 8th?

A. Yes.

Q. And you sent it by mail, hand delivered or how?

A. By mail, registered.

Q. And other than this communication, did you ever have any other communication with anyone on behalf of McChip Associates?

A. No."

(Emphasis added)

The instrument utilized as the basis of

this prosecution was invalid as to the violation of 26-521(b) since this statute presumes that a landlord has been notified of the tenant's desire to be restored to occupancy (and therefore an opportunity to comply with the request is afforded). The Notice posted subsequent to the execution of the accusatory instrument is wholly insufficient to satisfy the obvious intention of the Notice requirement. Consequently, prosecution of Petitioner under 26-521(b) was violative of Petitioner's fundamental constitutional right to due process of law.

> "No State shall ... deprive any person of liberty ... without due process of law..."

It is long understood that two of the cornerstones of due process are notice and an opportunity to be heard. See e.g. Oberlander v Perales, 740 F2d 116, 120 (2 Dept. 1984). If this concept is logically extended one step further, it would certainly appear that due process is offended when a statute which requires notice as a condition of violation is deemed to have been violated when notice was not

afforded at the time the violation was alleged. Due process is similarly flaunted where, as here, a defendant is prosecuted where the underlying facts obviously depart from the normal import of the language of the statute.

POINT II

CONVICTION OF THE PETITIONER UNDER SECTION 26 521(b) of the New York City Administrative Code for failing to take reasonable action to restore the tenant, denied petitioner due process of law, since the evidence established that the repairs required were wholly unfeasible from an economic standpoint. Thus, requiring Petitioner to make such repairs, deprived Petitioner of the reasonable use of his property without due process.

Once again our attention is turned to Section 26-52 (b) which provides, in relevant part:

> "It shall be unlawful for an owner of a dwelling unit to fail to take all reasonable and necessary action to restore to occupancy an occupant of a dwelling unit."
>
> (emphasis added)

'Reasonable' must be defined by its everyday common utilization, which is "not extreme or excessive" -- Webster's 7th New Collegiate Dictionary 1967.

It is respectfully contended that requiring a landlord to make repairs to enable a tenant to be restored to possession is not reasonable where the cost of such repairs far exceeds the potential rental income to be derived.

The following excerpt of the trial transcript gives a precise picture of the economic circumstances involved, (Tr. pg. 156 in 14 to Tr. pg 157 line 16:

Q. Mr. McEvoy, you previously testified that you made a determination of the cost to place the building in a habitable condition.

A. Yes.

Q. Have you ever made an analysis of whether or not the building after such renovations could sustain itself?

A. Yes.

Q. Economically?

A. Yes.

MS. NELSON: Objection to the relevance.

THE COURT: Overruled.

Q. Now, what factors did you take into consideration in making that determination?

A. Well --

THE COURT: Off the record.

(Discussion held off the record.)

A. What was the question again?

(Last question read back by court reporter)

A. Well, you spend forty thousand a unit to renovate it and there are three units in the building and one store and the store being in the middle of a block it's not a very -- not a good place to rent a store and to rent the apartments would probably bring about six, six-fifty a month after renovation and you're talking about getting back something like twenty-five hundred dollars on the building, it's not a good investment.

The Appellate Term, 1st Department, was presented with the above situation together with the added fact that obtaining a $200,000.00 loan for a period of twenty (20) years at prevailing rates of interest would require repayment of approximately Twenty-Four Thousand, Seven-Hundred and Seventy Dollars. ($24,770.00) This, when viewed with a potential annual income of $30,000 from rent leaves only slightly more than $5,000 per annum for improvements not related to the initial modifications to make the structure fit for habitation. This is obviously not an economically feasible exercise.

The Due Process Clause of the 14th Amendment of the United States Constitution provides,

in its relevant part,

> "No state shall ... deprive any person of life, liberty, or property without due process of law."
>
> (Emphasis added)

It would appear that a denial of the right to utilize one's property in an economically feasible manner is tantamount to a deprivation of the property itself. Decisions in this state have already acknowledged that economic feasibility is one question which courts may consider in determining whether to require repairs to a multiple dwelling structure. See eg. Atco Midwood Associates v. Benitez 106 AD 2nd 501, 482 NYS 2d 839 (AD 2 Dept 1984). It follows that the failure of the trial court to give consideration to the economic evidence and the finding of culpability derived petitioner of reasonable use of his property without due process of law.

POINT III

THE FAILURE OF THE TRIAL JUDGE TO GRANT PETITIONER A BRIEF ADJOURNMENT DUE TO THE FACT THAT HIS CHOSEN COUNSEL WAS OTHERWISE ENGAGED, DEPRIVED PETITIONER OF EFFECTIVE ASSISTANCE OF COUNSEL

The right to the effective assistance of counsel is provided by the Sixth Amendment to

the United States Constitution and is applied to the State Action by the 14th Amendment. It provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense."

In the instant case, petitioner's trial commenced on December 8, 1987 before Judge Leland DeGrasse. At that time Michael Silverstein, an associate of the trial counsel, Laurence E. Deutsch, was present. Mr. Silverstein pointed out to the court that Mr. Deutsch was in the process of selecting a jury in a matter before Judge Cohen in Kings County and requested a brief adjournment. This request was denied, notwithstanding the fact that Mr. Silverstein advised the court that he had been given the file the day before (Monday, December 7, 1987) and that "Mr. McEvoy does not want me to represent him" (Trial Transcript pg. 2 lines 14-15). Later on, petitioner was afforded the Hobson's choice of having an attorney with only fleeting familiarity with the case represent him or representing himself. The trial proceeded. Mr. Deutsch managed to interupt his jury selection

to attend the afternoon session where the situation was again explained to the judge. The following is an excerpt of the trial minutes which illustrates the situation:

> MR. DEUTSCH: The information you have been given is accurate to the extent that I had advised the justice presiding in the trial part, in criminal court, New York County, on the last calendar call of this case that I would be engaged in family court, Westchester County on the morning of the 7th and requested that this case be adjourned to at least twelve noon. At that time I was not aware of the fact that I would be directed by Judge Cohen to proceed with the other case. I cannot control the calendars of either court. I have no way of telling Judge Cohen that once we start his action that I must come to criminal court, New York County. Now this is not something of my making. It is not a request of an adjournment because I wanted an adjournment or because it is convenient for me or for any other reason having to do with me. I am caught between two trials I am the only attorney in my firm who has enough knowledge of both the matters to try both the matters, and I am caught between essentially two judges who say I have to try a case at the same time. I have a hard time doing it with a complete body and split in half I would be unable to do it at all.
>
> THE COURT: You say you did not have enough time to interview witnesses and prepare for trial. I'm looking at the court file and it shows that the matter was adjourned from August 24th to October 29th for trial, October 29th to November 19th for trial, from November 19th to December 1st to yesterday for trial. It has been on for

quite some time for trial and you have had ample time to prepare therefore this matter will not be adjourned. (Tr. pg 48, line 12--pg49 line 20)

This circuit has held that in order to demonstrate that a trial judge abused his discretion in denying a motion for an adjournment of the scheduled start of trial, a defendant is required to establish that the denial was arbitraryand substantially impaired his defense... U.S. v. King 762 F2d 252 (2 Cir 1985) cert den. 106 S.CT 1203, (1986). It is respectfully submitted that the facts presented herein demonstrate that the denial of the requested adjournment was arbitrary and that the facts that Mr. Deutschihad been called away from a jury selection and that the trial continued on consecutive days (December 9 and December 10) afforded Mr. Deutsch and petitioner no time for preparation, significnatly compromised the quality of the petitioner's defense. The scenario results in a conclusion that petitioner was denied the constitutionally mandated effective assistance of counsel.

CONCLUSION

FOR ALL THE REASONS SET FORTH HEREIN, IT IS RESPECTFULLY REQUESTED THAT THIS COURT REVERSE THE FINDINGS AND CONCLUSIONS OF THE LOWER COURTS IN THIS MATTER.

DATED: New York, N. Y.
December 17,1990

Respectfully submitted,

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UNLAWFUL EVICTION

§ 26–521 **Unlawful eviction.** a. It shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer or who has entered into a lease with respect to such dwelling unit or has made a request for a lease for such dwelling unit pursuant to the hotel stabilization provisions of the rent stabilization law except to the extent permitted by law pursuant to a warrant of eviction or other order of a court of competent jurisdiction or a governmental vacate order by:

(1) using or threatening the use of force to induce the occupant to vacate the dwelling unit; or

(2) engaging in a course of conduct which interferes with or is intended to interfere with or disturb the comfort, repose, peace or quiet of such occupant in the use or occupancy of the dwelling unit, to induce the occupant to vacate the dwelling unit including, but not limited to, the interruption or discontinuance of essential services; or

(3) engaging or threatening to engage in any other conduct which prevents or is intended to prevent such occupant from the lawful occupancy of such dwelling unit or to induce the occupant to vacate the dwelling unit including, but not limited to, removing the occupant's possessions from the dwelling unit, removing the door at the entrance to the dwelling unit; removing, plugging or otherwise rendering the lock on such entrance door inoperable; or changing the lock on such entrance door without supplying the occupant with a key.

b. It shall be unlawful for an owner of a dwelling unit to fail to take all reasonable and necessary action to restore to occupancy an occupant of a dwelling unit who either vacates, has been removed from or is otherwise prevented from occupying a dwelling unit as the result of any of the acts or omissions prescribed in subdivision a of this section and to provide to such occupant a dwelling unit within such dwelling suitable for occupancy, after being requested to do so by such occupant or the representative of such occupant, if such owner either committed such unlawful acts or omissions or knew or had reason to know of such unlawful acts or omissions, or if such acts or omissions occurred within seven days prior to such request.